

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2006 OAL Determination No. 1

ENDORSED FILED
IN THE OFFICE OF
2006 OCT 16 PM 4:18

BRUCE W. PETERSON
SECRETARY OF STATE

Petitioner: CHARLES CIANCIO

**Concerning: DEPARTMENT OF FORESTRY AND FIRE PROTECTION:
BUFFER ZONE FOR OSPREY NESTS
CTU-06-0417-01**

**Determination issued pursuant to Government Code section
11340.5.**

ISSUE

On April 17, 2006, Mr. Charles Ciano submitted a petition to the Office of Administrative Law (OAL), alleging that the California Department of Forestry and Fire Protection (CDF) employs an underground regulation in violation of Government Code section 11340.5. The petition alleges that CDF requires a 1,320 foot radius buffer zone around osprey nests in Timber Harvesting Plans (THPs) in violation of applicable California statutes and regulations.

CONCLUSION

The facts presented by and discovered in connection with this petition appear to demonstrate the use of an underground regulation, either by the Department of Fish and Game (DFG) or by CDF. The record before OAL, however, is limited. Necessary facts cannot be demonstrated with certainty and OAL has no fact finding authority which would allow us to prove these matters one way or another. Due to these factual limitations, we cannot say conclusively that the CDF, the agency against which this petition was filed, has employed an underground regulation in violation of section 11340.5 of the Government Code.

FACTUAL BACKGROUND¹

This petition involves the approval of THPs by CDF. Approval of the timber harvesting plan is required before private owners of forested property may harvest trees from the property. The process of developing and obtaining approval of a THP is complicated. It is described as follows on the CDF web site²:

The California Department of Forestry and Fire Protection (CDF) enforces the laws that regulate logging on privately-owned lands in California. These laws are

¹ CDF chose not to file a formal response to this petition pursuant to title 1, Cal. Code of Regs. §270(f). This factual background summary is based upon the petition, information from prior correspondence OAL has had on this issue, and publicly available information.

² http://www.fire.ca.gov/php/rsrc-mgt_forestpractice.php

found in the Forest Practice Act [³]. . . which was enacted in 1973 to ensure that logging is done in a manner that will preserve and protect our fish, wildlife, forests and streams. Additional rules enacted by the State Board of Forestry and Fire Protection are also enforced to protect these resources. CDF ensures that private landowners abide by [California's timber harvesting] laws when harvesting trees. Although there are specific exemptions in some cases, compliance with the Forest Practice Act and Board rules apply to all commercial harvesting operations for landowners of small parcels, to ranchers owning hundreds of acres, and large timber companies with thousands of acres.

The Timber Harvesting Plan (THP) is the environmental review documents submitted by landowners to CDF outlining what timber he or she wants to harvest, how it will be harvested, and the steps that will be taken to prevent damage to the environment. THPs are prepared by Registered Professional Foresters (RPFs) who are licensed to prepare these comprehensive, detailed plans. THPs can range from about 100 pages to more than 500 pages.

CDF does not have the authority to deny a THP that is in compliance with state and federal rules and laws, simply because the logging plan is unpopular with the public. The Department reviews and approves between 500 to 1,400 THPs each year. A THP that does not comply with all forestry and environmental regulations is returned to the RPF. It is only approved after the RPF and landowner agree to make the changes necessary to ensure compliance with all laws. CDF follows-up on approved THPs with site inspections and can shutdown operations, cite or fine Registered Professional Foresters, Licensed Timber Operators (LTOs), and landowners if illegal operations are found.

The THP is the environmental review document prepared by an RPF for the landowner. The THP includes the timber the landowner wishes to harvest, the method of harvesting and the steps taken to prevent damage to the environment. The requirements for developing the THP are found in the Z'berg-Nejedly Forest Practice Act of 1973⁴.

A property owner who wants to harvest timber must employ a Registered Professional Forester (RPF) to help develop the THP. The THP must comply with all forestry and environmental regulations before CDF will accept it for consideration. Once CDF accepts the THP for consideration, it makes it available for public review and provides it to a variety of other state agencies for their review and feedback⁵.

³ The web site provides a link to a document that provides an apparently comprehensive compilation of relevant California regulations and statutes.

⁴ California Public Resources Code, division 4, chapter 8, and the California Forest Practice Rules adopted by the CDF in title 14 Cal. Code Regs §§ 895 – 1115.3.

⁵ Pursuant to title 14, Cal. Code Regs §1037.3, the THP is provided to "the Department of Fish and Game, the appropriate California Regional Water Quality Control Board, the Department of Conservation,

During the agency and public review period the proposed THP is subject to amendment. The THP, as developed by the RPF, is submitted to the CDF as the lead agency in the review of the Plan. The review consists of a multidisciplinary review team of specialists from other governmental agencies to ensure compliance with environmental laws and regulations. During this review period, the members of the review team may suggest additional recommendations. It is during this review period that the DFG consistently asks that the plans be amended to expand osprey buffer zones from the maximum radius allowed in CDF's regulations to a radius of one-quarter of a mile – 1,320 feet – around the nests⁶. A 1,320 foot radius buffer zone is significantly larger than required by applicable California law. A petitioner who agrees to include a one-quarter mile radius buffer zone in the THP avoids having the DFG contest this point further in the THP approval process.

Public Resources Code section 4581 provides:

No person shall conduct timber operations unless a timber harvesting plan prepared by a registered professional forester has been submitted for such operations to the department pursuant to this article.

The CDF has adopted regulations establishing the buffer zone for the osprey in subchapters 4, 5, and 6 of Title 14 of the California Code of Regulations (CCR). Subchapter 4 covers the Coast Forest District, subchapter 5 covers the Northern Forest District, and subchapter 6 covers Southern Forest District. The language is identical for each district (title 14, CCR, §§ 919.3, 939.3, and 959.3):

The following requirements shall apply to nest sites containing active nests and not to nest sites containing only abandoned nests.

(a) Buffer zones shall be established around all nest trees containing active nests. The buffer zones shall be designed to best protect the nest site and nesting birds from the effects of timber operations. In consultation with the Department of Fish and Game, and as approved by the Director, an RPF or supervised designee shall flag the location of the boundaries of the buffer zone, and the configuration of the buffer zone. Consultation with the Department of Fish and Game shall be required pursuant to 14 CCR 898. Consideration shall be given to the specific habitat requirements of the bird species involved when configuration and boundaries of

Division of Mines and Geology, the Department of Parks and Recreation, the county planning agency and, if the areas are within their jurisdiction, to the California Tahoe Regional Planning Agency and the California Coastal Commission."

⁶ The CDF regulations provide for a buffer zone of five acres with an option to increase the zone to 18 acres. According to the math used by the petitioner, five acres would be a roughly 263.5 foot radius around the nest, and 18 acres would be a 763.2 foot radius. The THPs recommended by DFG, and approved by CDF include a 1,320 foot radius – 125.6 acres.

the buffer zone are established.

(b) The size of the buffer zone for each species shall be as follows:

...

(5) For the Osprey, the buffer zone may be up to five acres in size. When explained and justified in writing, the Director may increase the size of the buffer zone to a maximum of 18 acres when necessary to protect nesting birds.

According to the information provided in the petition, the recommendations by DFG are routinely added to the THP. The RPF and the landowner agree to the recommendations before it is submitted to CDF. In January of 2006, Mr. Ciancio requested an explanation of the larger buffer zone from CDF. In a response dated January 17, 2006, William Snyder, Deputy Director, Resource Management for CDF states:

In all three examples provided and in recognition of the time and cost associated with a plan denial or withdrawal, CDF elected to work with the plan submitters, DFG and the RPF. As required under 14 §1037.5(f), the plan submitters agreed to incorporate the specific additional mitigation measures into the plan established for the protection of Osprey through consultations with DFG. As provided by the FPRs under 14 CCR § 919 and 898.1 (b), CDF relied on the expertise of DFG in establishing these mitigation measures during the review of each plan.

The record before OAL includes several examples of THPs which incorporate the one-quarter mile osprey nest buffer. The record does not include an explicit rule or policy statement by CDF, DFG, or any other state agency which purports to require all THPs to contain such a buffer zone.

UNDERGROUND REGULATIONS

Government Code section 11340.5, subdivision (a), prohibits state agencies from issuing rules unless the rules comply with the Administrative Procedure Act (APA). It states as follows:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency employs a rule in violation of section 11340.5 it is employing an underground regulation. "Underground regulation" is defined in title 1, CCR, § 250 as follows:

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

To determine that an agency employs an underground regulation in violation of Government Code section 11340.5, it must be demonstrated that the agency employs a regulation, that the regulation has not been adopted pursuant to the APA, and that the rule is not subject to an express statutory exemption from the APA.

OAL is empowered to issue its determination as to whether or not an agency employs an underground regulation pursuant to Government Code section 11340.5, subdivision (b). An OAL determination that an agency is using an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to "due deference"⁷ in any subsequent litigation of the issue.

ANALYSIS

To conclude that a state agency is employing an underground regulation, OAL must determine that the agency is employing a rule that is applicable generally. This is most easily done when the agency has a written policy statement or other directive that, on its face, constitutes a rule of general application. In this case we do not have such a written rule. The record before OAL does not include any documents from CDF, DFG, or any other state agency establishing an explicit rule of general application that requires all THPs to have a 1,320 foot radius buffer zone around an osprey nest. On the other hand, CDF, subject agency of this petition and the agency which has the final approval authority for THPs, has not identified any approved THP with an osprey nest buffer zone of less than 1,320 feet. The record before OAL includes several examples of THPs containing the 1,320 foot buffer zone. The record includes no evidence that a THP has ever been approved with less than a 1,320 foot buffer zone around each osprey nest. This record is certainly most consistent with the existence of a rule of general application, but it does not establish the existence of such a rule to a legal certainty.

Although the record before OAL does not include any writing that appears to create a rule of general application, either as an instruction to state employees to require a 1,320

⁷ *Grier v. Kizer* 219 Cal.App.3d 422, 268 Cal.Rptr. 244; 1990

foot buffer zone in all cases, or as a purported rule establishing a standard that property owners must satisfy when seeking approval of a THP, the lack of a written rule does not mean that no underground regulation is being employed. Government Code section 11340.5 provides that a state agency shall not "utilize, enforce, or attempt to enforce any . . . standard of general application". An underground regulation does not need to be a written rule.⁸

OAL does not have legal power to compel production of documents or testimony. If this issue were litigated, those challenging the one-quarter mile buffer zones would be able to engage in discovery proceedings through which the facts underlying the imposition of an apparently uniform requirement could be established. This could show definitively whether or not CDF or DFG are employing a rule of general application. The facts available to OAL are most consistent with the conclusion that there is a rule of general application producing these uniform results. The facts are not, however, conclusive. Other facts not in the record before us could demonstrate that no standard of general application is being applied. Since OAL cannot serve as a finder of fact, we cannot develop the record that would allow us to find conclusively whether or not such contrary facts exist.

Although not conclusive to a legal certainty, in this case the available facts are most consistent with the conclusion that a property owner cannot expect to obtain approval of a THP without agreeing to a quarter-mile buffer zone around each osprey nest. This fact is most consistent with the conclusion that a state agency involved in the THP approval process is employing an underground regulation to require a 1,320 foot buffer around every osprey nest. The limited record before us is most consistent with the existence of an underground regulation.

Assuming, for the sake of further analysis, that the one-quarter mile buffer zone around osprey nests is in fact the result of an underground regulation, the question remains of what agency is employing the underground regulation. This question is complicated by the numerous entities involved in the THP approval process.

Although CDF has adopted regulations specifying the size of the buffer zone, there does not appear to be any law which prevents a landowner from voluntarily agreeing to the larger buffer zone recommended by DFG. If acceptance of a 1,320 foot buffer zone by each property owner is truly voluntary and in each instance this results from a case-by-case analysis specific to each THP, then there would be no underground regulation. If,

⁸ The most recent case by the California Supreme Court dealing with underground regulations, *Morning Star Company v. State Board of Equalization* (2006) 38 Cal.4th 324, 42 Cal.Rptr.3d 47 found that the Department of Toxic Substances Control had employed an underground regulation solely in the manner in which it implemented a statute. No written rule was involved but the Court had no difficulty in inferring the existence of a rule of general application based upon the agency's actions.

however, acceptance of the one quarter mile buffer zone is somehow coerced, the issue arises of whether this is being enforced by CDF or by DFG.

Evidence in the file indicates that the acceptance of a 1,320 foot buffer area for osprey nests by property owners is not entirely voluntary. The CDF has adopted regulations specifying the extent of buffer zones around osprey nests. It is during the review process that the larger buffer zone is added to the THP at the recommendation of DFG and the agreement of the RPF and landowner. The documents submitted establish that CDF interprets the revised THP to be the result of a voluntary agreement between DFG, the RPF and the landowner.

To conclude that an underground regulation is being employed, therefore, OAL must conclude that, in fact, the uniform acceptance of a one-quarter mile buffer zone by THP applicants is not truly voluntary. In reviewing the documents submitted by the petitioner in a previous request for determination with respect to actions by DFG,⁹ we found a letter from Dick Dickerson, Assemblyman from the Second District and a former Vice-Chairman of the Natural Resources Committee and the Water Parks and Wildlife Committee. In the letter dated November 20, 2002, Mr. Dickerson says:

We have talked to the State Fish and Game officers involved in this petition and while their intentions are honorable they seem to have gone way outside the parameters set in law for the protection of the species.

I hope you will agree that if stricter protective measures may have been voluntarily agreed to and used by other landowners, it should not necessarily raise the official bar above the law for other landowners.

Again, the record is not adequate to allow OAL to evaluate definitively whether the agreement to the DFG recommendations is truly voluntary, or whether the property holders accept buffer areas much larger than are required by regulation out of fear that opposing the buffer area recommended by DFG will result in costly and time-consuming appeals and litigation. This is another fact-dependent matter which cannot be effectively examined by OAL, which is not a court and lacks the tools to compel cooperation, such as the power of subpoena, which are available to a court.

The question of whether or not the acceptance of a 1,320 foot radius buffer zone is truly voluntary affects the question of which state agency may be employing an underground regulation here. The apparent CDF position is that the THP reflects a mutually agreed

⁹ This request for determination alleged that the larger buffer zone was imposed by DFG and was an underground regulation. At the time that petition was submitted OAL had suspended issuance of determinations due to staff reductions. OAL did not accept the request and a determination was not made on the issue.

upon course of action. This position, if correct, implies that CDF does not issue, use, enforce or attempt to enforce an underground regulation. It merely approves the THP that reflects both the recommendations of the review committee and the acceptance of those recommendations by the landowner and RPF. Under this interpretation, CDF does not implement any rules. Rather, it simply ratifies a voluntary agreement. If, however, CDF is aware of facts indicating that DFG imposes a rule requiring a 1,320 foot buffer area, and is aware of facts indicating that this buffer area is imposed upon property owners involuntarily, then CDF's review and approval of these THPs could place CDF in the position of enforcing DFG's underground regulation. Such facts would place both DFG and CDF in violation of section 11340.5 of the Government Code. Again the file before OAL does not contain facts sufficient for OAL to reach this conclusion to a legal certainty.

Other facts indicate some degree of difference between the way that CDF approaches the issue of establishing osprey buffer zones and the way that DFG approaches the issue. In 2003, petitioner requested a determination also challenging the size of the osprey buffer zone.¹⁰ Larry Week, Chief of the Native Anadromous Fish and Watershed Branch at DFG says in a letter concerning the request, dated March 12, 2003, and addressed to Regional Managers at CDF:

The Department [DFG] would like to clarify that no standard or rule of general application should be used to determine appropriate buffer zones for osprey nests. Instead, protective measures should be based on site-specific project condition, pertinent scientific information, and biological discretion. The Native Anadromous Fish and Watershed Branch (NAFWB) in cooperation with the Regions and Habitat Conservation Planning Branch is in the process of composing guidance that will suggest biological criteria that should be employed when making project specific mitigation measures and recommendations to CDF. Until that guidance is issued, please continue to individually evaluate each osprey nest within the boundaries of a THP, and make any necessary recommendations regarding buffer zones based on the biological factors of each THP and nest site.

It is clear that CDF and DFG have differing concepts of the role of regulation in the THP process. CDF has duly adopted regulations – standards and rules of general application for setting the size of buffer zones. DFG does not appear to feel that it must obey these regulations and, instead, indicates that it makes a decision based on a case-by-case evaluation. It is curious that each such case-by-case evaluation results in a buffer zone of exactly 1,320 foot radius around each osprey nest. As with other issues, this does not determine which of these two agencies, if either, is employing an underground regulation. It does, however, demonstrate the complications of this issue.

¹⁰ Another previous request for determination was similar to this petition in that it alleged CDF was using an underground regulation to impose a larger buffer zone. OAL was unable to accept the request and a determination was not made on the issue.

CONCLUSION

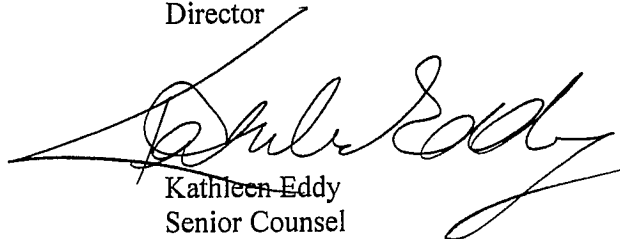
The facts presented in this petition demonstrate a high probability that either the CDF or the DFG or both of them are employing an underground regulation in requiring every THP to provide a 1,320 foot radius buffer zone around every osprey nest. However, since there is no written expression of this standard, the existence of the underground regulation can only be inferred through analysis of the facts. Since OAL has no authority to compel testimony or the production of documents, our ability to state a definitive legal conclusion is limited in a fact-dependant situation.

In particular, the fact that the alleged underground regulation is enforced through a series of negotiations on individual THP applications which allegedly result in voluntary agreements by applicants, makes it impossible for OAL to reach a definitive legal conclusion. If acceptance is truly voluntary, there may be no underground regulation being employed by a state agency. If acceptance is in some way required or coerced by a state agency, that agency would appear to be enforcing an underground regulation. Although it is easy to form opinions about what is probably involved in these negotiations, opinions alone cannot form the basis of a legal conclusion. OAL cannot conclude with legal certainty, based upon the record before us, that the acceptance of the quarter mile buffer zones is involuntary. A court would be able to engage in fact finding to prove or disprove this conclusion; OAL cannot.

Furthermore, because the process which creates the one-quarter mile buffer zone in each THP in the file before us involves both CDF and DFG, OAL cannot say with certainty that any underground regulation involved here is being enforced by CDF, the agency which is the object of the petition. Again, a court could develop a factual record on these issues; OAL cannot.



William L. Gausewitz
Director



Kathleen Eddy
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